87-85

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ALBERT J. BUSHONG,
PETITIONER

v.

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALBERT J. BUSHONG
Petitioner
One Marine Midland Plaza
Rochester, New York 14604
(716) 232-3937

QUESTIONS PRESENTED

1. Does the Trial Court have an obligation and duty to resolve an issue before proceeding with trial, which revealed that an individual may be suffering from a clinical disorder, "paranoid" or "grandiose delusion", which could bear upon the issue of whether he possessed the "specific intent" required for the offenses charged?

2. Was the petitioner denied a fair trial because of the Trial Court's refusal to resolve an issue relating to petitioner's mental condition and symptoms, his pathological beliefs and how these influenced or could have influenced his behavior to make a false statement, or not to file a return?

3. Is a defendant entitled to introduce evidence to a jury through the expert testimony of a court-appointed psychiatrist, relating to a mental defect or other condition bearing upon whether he had the specific intent required for the offenses charged?

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The Petitioner, Albert J. Bushong, Pro Se, respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra, (1a-2a) was entered by order dated October 21, 1986.

JURISDICTION

The judgment of the Court of Appeals was entered on October 21, 1986. On October 31, 1986, a petition for rehearing containing a suggestion that the action be heard EN BANC, was denied by order dated March 3, 1987. (App. B, infra.) The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> "no person...shall be deprived of...liberty, or property, without due process of law..."

The Sixth Amendment provides in pertinent part:

> "In all criminal prosecutions the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor..."

Rule 12.2(b) and (c) of the Federal Rules of Criminal Procedure states:

> "(b) **Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged.** If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.
>
> (c) **Psychiatric Examination.** In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding."

STATEMENT

The Petitioner seeks review from a judgment of conviction in the District Court for the Northern District of New York on October 2, 1985, for a violation of three counts of Willful Failure to File income tax returns, 26 USC Section 7203; and one count of wilfully making a false statement to a government agency, 18 USC Section 1001.

During the trial, the petitioner who proceeded Pro Se, displayed behavior which caused the trial judge to become concerned, whereby the petitioner was ordered by the Court to submit to a psychiatric examination. (TR.pp 2338-239)*

The trial court expressly instructed and ordered two questions to be answered;

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* All references are to the Trial Transcripts (record) on appeal.
United States v Bushong, #85-1362 and 85-1450.

"...Whether he's capable of understanding the proceedings, cooperating in his defense...and; whether he is capable of knowing the difference between right and wrong and able to conform to the acceptable, lawful standards..." (TR p. 239)

Dr. Lawrence Seltzer, who had examined the Defendant, testified out of the presence of the jury, that the Defendant was capable of understanding the nature of the proceedings, and cooperating in his defense. (TR p. 247, 252-255) However, Dr. Seltzer qualified his testimony by adding:

"...he sees it...that what he's doing is right, but what people have done to him is wrong with respect to investigating himself...

In general, you know, I had to think about this case a lot because there is a lot I don't know...There is a lot of questions I don't have answered. I really don't know how he's been functioning the last few years. I don't know how his family feels about him and how he's doing. I don't know if he is--of course this could be-he's manifested like grandiosity, feelings of grandeur to be able to confront the United States Government..so would like to know more about him.

I really think that a good psychosocial history should be done..

I just know of one case, but I know investigation by the Internal Revenue can be very stressful to people and can make them very emotionally upset. Again, I can just encompass, maybe (he) has a paranoid or grandiose delusion, and it's very hard to see if this is such without further investigation...I don't know...how much he misreads reality. So I told you I saw him and I have a question. I can't just say that this man completely is mentally stable. I have questions about it. Perhaps he has some problems, but then I don't know what the degree of those problems are and how they would affect his judgment...So all I can say is I don't know. I have my doubts..." (emphasis added) (TR pp 250-252)

Such testimony clearly revealed to the Trial Court that the petitioner may very well be suffering from a clinical disorder, "paranoid or grandiose delusion" and that additional time was needed to resolve such an issue.

However, the trial judge who had expressly instructed and ordered this question to be answered, failed to resolve the issue, and

proceeded on with trial. Petitioner was convicted, and that conviction was affirmed on appeal.

REASONS FOR GRANTING THE PETITION

In this case, the trial judge failed to resolve and decide a crucial question, which he had posed which directly related to a mental disease, or other condition bearing upon the issue of whether or not the petitioner had the mental state required for the offenses charged. The Court of Appeals simply affirmed the judgment of conviction, apparently without addressing the merits of this issue. Under these circumstances, this case presents an important question concerning the responsibility and obligation of a Trial Court which had ordered a defendant to submit to a psychiatric examination, bearing upon the issue of whether he had the mental state required for the offenses charged, and to resolve that issue before proceeding to trial. It is patently

insufficient to raise an issue relating to a mental defect and then decline to resolve that question.

1. A defendant's mental condition and symptoms, his pathological belief and motivation, if he be thus afflicted could influence his behavior; particularly his mental capacity to knowingly make the false statement charged, although (lacking) the mental state required to commit the offense. See Rhodes v United States, 282 F2d 59, 62 (4th Cir., 1960).

Evidence introduced through the expert testimony of a psychiatrist, relating to Defendant's state of mind for the purpose of showing an inability or lack of the requisite specific intent of willfulness, is admissible. See United States v Erickson, 676 F2d 408 (CA 10, 1982) ("Expert Testimony admitted to show Defendant lacked the ability to form specific intent of willfulness"); accord United States v Gorman, 303 F2d 209, 211 (Ca 7, 1968) and United States v McBride (slip opinion) No.

85-1165 March 3, 1986 (CA 2), ("Court erred in excluding expert testimony to assist jury in its assessment of Appellants state of mind, conviction reversed..")

The trial judge in the present case failed to resolve the question relating to the petitioner's mental condition and symptoms, his pathological belief, particularly his mental capacity to knowingly violate the law.

2. The "Ends of Justice" mandate that a defendant receive a fair trial. However, when a defendant is convicted of an offense which required a "specific intent", and an unresolved question exists which bears directly upon the issue of whether he had the "specific intent" required to be convicted for the offense charged, as is the case at bar, failure to resolve such an issue cannot be deemed to be consistent with the fundamental element of due process derived from the Fifth Amendment. Thus, the "Ends of Justice" become meaningless for they have been abandoned.

3. By accepting such a standard of dereliction, the Court of Appeals has created a rule which apparently is in conflict with Rule 12.2(b) and (c) of the Federal Rules of Criminal Procedure, and the petitioner's right to present a full and adequate defense. The Trial Court compounds this error by compelling the petitioner to proceed to trial, even after a court-appointed psychiatrist had expressed his concern that the petitioner may be suffering from a clinical disorder, "paranoid or grandiose delusion." Such a procedure does not serve the best interest of the petitioner, or the fairness and integrity of our judicial system.

Due to the great practical importance of the court's ruling, this Court should correct the erroneous refusal of the Court of Appeals to hold the Trial Court responsible to resolve that issue it had ordered to be answered which directly related to whether or not petitioner suffered from a mental defect or other condition bearing upon the issue of whether he

had the mental state (wilfullness) required for the offenses charged. (See Rule 12.2 (b) and (c) of the Federal Rules of Criminal Procedure.)

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Albert J. Bushong, Petitioner
One Marine Midland Plaza
Rochester, New York 14604
SUITE 1129

* The Petitioner was assisted by a paralegal in the preparation and drafting of this Petition.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 21th day of October, one thousand nine hundred and eighty six.

Present:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,

HONORABLE JON O. NEWMAN,

HONORABLE GEORGE C. PRATT,

Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

ALBERT J. BUSHONG,
Defendant-Appellant.

85-1362
85-1450

ORDER

Albert J. Bushong appeals pro se from a

judgment of the District Court for the Northern District of New York (Lloyd F. MacMahon, Judge, sitting by designation) convicting him, after a jury trial, of three counts of failure to file income tax returns, 26 U.S.C. 7203 (1982), and one count of making a false statement to a government agency, 18 U.S.C. 1001 (1982). His appeal is entirely without merit.

1. There was no error in limiting Bushong's testimony concerning his views that the Internal Revenue Code establishes only voluntary obligations and is unconstitutional because the Sixteenth Amendment was not ratified by a sufficient number of states. No testimony was precluded that would have been material to a legitimate defense based on a good-faith misunderstanding of tax law. See United States v. Kraeger, 711 F2.2d 6 (2nd Cir. 1983).

2. The District Court properly prohibited Bushong from eliciting from a psychiatrist testimony concerning the sincerity of Bushong's

views about the unconstitutionality of the Internal Revenue Code.

3. The was sufficient evidence that the statement Bushong made to an employee of the Internal Revenue Service -- falsely denying receipt of income -- was in relation to a matter within the jurisdiction of an agency of the United States, as required by section 1001. There is no separate requirement of materiality. United States v. Elkins, 731 F2.d 1005, 1009 (2d Cir. 1984).

4. Bushong's challenge to the constitutionality of his post-conviction detention without bail was not raised in the District Court and is without merit. See United States v. Randell, 761 F.2d 122 (2nd Cir. 1985).

The judgment of the District Court is affirmed.

/s/ Ellsworth A. Van Graafeiland
/s/ Jon O. Newman
/s/ George C. Pratt
Circuit Judges

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 3rd day of March, one thousand nine hundred and eighty seven.

UNITED STATES OF AMERICA,
Appellee,

v.

85-1362
85-1450

ALBERT J. BUSHONG,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by Defendant-Appellant, Albert J. Bushong, pro-se,

Upon consideration by the panel that heard the appeal, it is ordered that said petition for rehearing is denied.

It is further noted that the suggestion for rehearing en banc has been transmitted to the

judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
Clerk

CERTIFICATION

I hereby certify that on this 1st day of May 1987, I mailed a copy of the within Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, to the following individual, postage prepaid in the United States mail.

Honorable Charles Freid
Solicitor General of the United States
U. S. Department of Justice
Washington, DC 20530

/s/ Albert J. Bushong, Petitioner